broadcasting facilities." *Id.* (emphasis added).[14] The Commission observed that under the exception, "*ownership* interests of minority group *owners* are aggregated in computing control." *Id.* (emphasis added). This observation reasonably implies that the computation of "control"—that is, the determination whether a station is "minority-controlled"—depends entirely upon the aggregation of "ownership interests." No suggestion is made that "de facto control" is also required.

5. The LPTV minority preference.

The Commission's action in analogous matters also supported Mr. May's interpretation of the minority exception. One of these matters was the minority low-power television ("LPTV") lottery preference that the Commission adopted in 1983. As Trinity explains in its motion to vacate, the Commission adopted the preference "because Congress mandated the preference in order to increase minority ownership *per se* without regard to control, and that mandate became the Commission's policy." Trinity Motion to Vacate at 18; *see generally id.* at 18-30 (demonstrating this proposition). The Mass Media Bureau concedes this point:

> The Commission's [LPTV] rule making proceedings and its public notice and accompanying instructions for claiming preferences indicated that mere ownership of more than 50% of [an LPTV] applicant was sufficient to support a minority preference claim. *See Low Power Television Broadcasting*, 82 FCC 2d 47, 75 (1980); *Random Selection Lotteries*, 93 FCC 2d 952, 976-77 (1983); TBF Ex. 105, Tab G. Thus, in the case of a non-stock corporation like NMTV one would only look to its board of directors to determine whether the corporation was minority-controlled within the meaning of the [LPTV] rules and policies.

[14] *Accord id.* (citing the Commission's purpose "to facilitate minority ownership of broadcast facilities"). The rulemaking notice also called the "minority-controlled" station exception an "incentive[] designed to facilitate the minority ownership of broadcast facilities," *id.* at 27632, and a "minority ownership incentive[]," *id.* at 27630 n.12. The separate statement of Commissioner Rivera called it the latter term no fewer than three times. *See id.* at 27632.

MMB Reply at 2, ¶ 3.

The Bureau's concession is based, of course, on the plain text of the LPTV rule, which grants preferences to applicants "more than 50% of whose ownership interests are held by members of minority groups." *Random Selection Lotteries*, 93 FCC 2d at 1007 (adopting new 47 C.F.R. § 1.1622(b)(1)). This language is essentially identical to the relevant language in the multiple ownership rule: "more than 50 percent owned by one or more members of a minority group." § 73.3555(d)(3)(C).[15]

6. Other definitions of "control" in the Commission's Rules.

That the Commission could reasonably be assumed to have meant just what it said when it adopted an ownership-only definition of "minority-controlled" for purposes of § 73.3555(d) was also confirmed by comparing that provision with other Commission Rules. Those rules, not to mention the Commission's decisions, referred to no fewer than six kinds of "control": "de jure control," *e.g.*, 47 C.F.R. § 76.934(a) (1995); "*de facto* control," *e.g.*, *id.* § 24.709(b)(5)(i)(B); "[v]oting control," *e.g.*, *id.* § 24.320 note to paragraph (h); "actual working control," *e.g.*, *id.* § 20.6(d)(1); "negative control," *id.*; and "operating control," *id.* § 61.171. Notwithstanding all these possible alternative formulations, the Commission deliberately chose in § 73.3555(d) to define the crucial term by reference to ownership alone: "'minority-controlled' means more than 50 percent owned by one or more members of a minority group." § 73.3555(d)(3)(C).

The Commission has clearly demonstrated in other contexts the ability to define "minority-controlled" differently when it had reason to do so. While all of these definitions

[15] Significantly, § 309(i)(3) of the Communications Act, which authorized the Commission to conduct lotteries, is not limited to LPTV, but authorized lotteries and minority preferences for "any media of mass communications." 47 U.S.C. § 309(i)(3).

were not available to Mr. May in 1986-87, they nonetheless should inform an analysis of the reasonableness of his actions, because they demonstrate that the Commission itself has never understood "minority-controlled" to have a single definitive definition contrary to that employed by Mr. May.

For example, in adopting rules in 1994 with respect to the preferences that may be awarded to "businesses owned by members of minority groups" as part of competitive bidding proceedings, the Commission explicitly indicated that a greater than 50 percent ownership by minorities is *not* sufficient for a business to qualify for the preferences. Not only must minorities "have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest," minorities must *also* "control the applicant." *Id.* § 1.2110(b)(2). In context, this means that minorities together must exercise power "over the operations or management of the concern." *Id.* § 1.2110(b)(4)(ii)(B). The Commission made this point crystal clear in applying competitive bidding procedures to personal communications services (PCS). It mandated that an applicant or licensee would be eligible for minority preferences in PCS licensing only if members of minority groups "possess *de jure* control and *de facto* control of an applicant or licensee" as well as "own unconditionally at least 50.1 percent of the total voting interests of [the] corporation." *Id.* § 24.320(c)(1), (h)(1) (narrowband PCS); *accord id.* § 24.720(c)(1), (k)(1) (broadband PCS). Furthermore, as part of the affiliation provisions of the minority preferences in broadband PCS licensing, the Commission adopted the following definition: "the term minority-controlled entity shall mean, in the case of a corporation, an entity in which 50.1 percent of the voting interests is owned by members of minority groups . . . and, in all cases, one in which members of minority groups have both *de jure* and *de facto* control of the entity." *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 10 FCC

Rcd 403, 502 (1994) (emphasis deleted) (adopting 47 C.F.R. § 24.720(*l*)(11)(ii)).[16]

In sum, these provisions, which demonstrate that the Commission itself has recognized that the term "minority-controlled" may have different definitions in different contexts, confirm that an attorney would not be unreasonable in accepting the particular definition set forth in the plain language of the very rule that he was construing. Certainly, a reasonable attorney in 1986-87 would not necessarily (under the standard articulated in *FTS I*) have concluded that "minority-controlled" had a universally accepted meaning that required minorities to have actual working control as well as ownership.

7. The Commission's purpose in adopting the exception.

The reasonableness of taking at face value the ownership-only definition of "minority-controlled," as set forth in the plain language of § 73.3555(d), is further confirmed by the Commission's expressed purpose in adopting the minority exception. As indicated in its 1985 reconsideration order, the Commission has viewed increased "minority *ownership*" of broadcast stations as an important goal, in and of itself, that the Commission has sought to foster through its policies. *See Amendment of Section 73.3555*, 100 FCC 2d at 76 (explaining that the "numerical station limits should be adjusted to promote minority ownership of broadcast facilities"); *id.* at 94 (recognizing that the minority exception to national multiple ownership rule might "foster[] minority ownership"); *id.* (identifying one of the rule's purposes as "promoting minority ownership"); *id.* at 95 n.58 (concluding that a similar minority exception appropriately "encourage[d] minority ownership in television broadcasting" and citing legislation under which the exception would apply to entities based solely

[16] This portion of the preference was revised—and the definition deleted—in light of the Supreme Court's decision in *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995). *See* 11 FCC Rcd 136, 181 (1996).

on the extent to which they were minority "owned," *see* H.R. 6134, 98th Cong., 2d Sess. (1984); S. 2962, 98th Cong., 2d Sess. (1984)).

The Commission's recognition that "minority ownership" of broadcast stations serves significant government interests was accepted by the Supreme Court in *Metro Broadcasting*, a case that postdates Mr. May's advice but that rests on policies already in place by 1986-87. In *Metro Broadcasting*, the Court accorded deference to the conclusion of Congress and the Commission that "the minority ownership programs are critical means of promoting broadcast diversity." 497 U.S. at 579; *see also id.* at 570 (accepting "[t]he FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity"). The Court observed that this conclusion is "consistent with longstanding practice under the Communications Act," which is "premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience." *Id.* As the Court acknowledged, Congress and the Commission did not assume that minority ownership would "in every case . . . lead to more minority-oriented programming." *Id.* at 579. "Rather," said the Court, "both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity." *Id.*

In addition, the Court in *Metro Broadcasting* observed that minority ownership had long been recognized by Congress to serve other interests as well, such as lowering "the barriers encountered by minorities in entering the broadcast industry" as a result of past discrimination and present economic disadvantage. *Id.* at 572; *accord id.* at 593. These barriers included "a lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience." *Id.*

These longstanding policies, as identified by the Supreme Court in *Metro*

Broadcasting, are consistent with an ownership-only definition of "minority-controlled" for purposes of § 73.3555(d). It is not necessary for every minority owner to possess actual working control of his station in order for there to be "in the aggregate, . . . greater broadcast diversity." And minority ownership alone serves to reduce "the barriers encountered by minorities in entering the broadcast industry" by, for example, providing minorities with a means of gaining entry to the industry, acquiring experience in and expertise about the industry, and making contacts with financial backers and other industry participants. Therefore, a reasonable attorney would not necessarily have concluded in 1986-87 that a minority preference based on minority ownership alone was inconsistent with the congressional and Commission policies motivating the preference.

A reasonable attorney could also have concluded that, at least in the case of the multiple ownership rule, the Commission had concluded that a bright-line "ownership" standard was more workable than a more nebulous "ownership and control" standard. Both the Supreme Court and the Commission have recognized the many benefits of bright-line rules: In general, such rules prevent "controversy and confusion," thereby "encourag[ing] settled expectations and, in doing so, foster[ing] investment by businesses and individuals." *Quill Corp. v. North Dakota*, 504 U.S. 298, 315, 316 (1992). Bright-line rules adopted by the Commission in particular have "the important advantage of being easy for applicants to comprehend and apply"; they are thus "easy for applicants to comply with." *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2914, 2915 (1995). Moreover, such rules enable "the Commission staff [to] process applications far more efficiently," *id.* at 2915, which "eases the administrative burden on the Commission," *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7988, 8105 (1994); *see Telephone & Data Sys. v. FCC*, 19 F.3d 42, 50 (D.C.

Cir. 1994) (observing that Commission's criteria for "de facto control" were subject to "arbitrariness and capriciousness" in their application). It would not have been unreasonable to conclude that the Commission sought to achieve the benefits of clarity here.[17]

Finally, the congressional purpose behind the LPTV preference supports the conclusion that ownership rather than control was the paramount consideration. In 1982, Congress mandated: "To further diversify the *ownership* of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group." Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115(c)(1), 96 Stat. 1087, 1094 (emphasis added) (amending 47 U.S.C. § 309(i)(3)(A)). The conference report explained just exactly who was to benefit from the preference: "The Conferees intend that . . . the Commission award a significant minority ownership preference to those applicants, a majority of whose ownership interests are held by a member or members of a minority group." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44, *reprinted in* 1982 U.S.C.C.A.N. 2261, 2288. The report also explained that the preference was "[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications." *Id.* Both the object of the preference and its purpose thus support the conclusion that Congress intended the preferences to advance minority *ownership* without regard to the exercise of "de facto control" by minorities. A

[17] The difficulties that are presented by the absence of a bright-line "ownership" rule are illustrated by the Bureau's attempt to explain the sort of interest that non-minorities are permitted to have under § 73.3555(d): "Such an interest," speculates the Bureau, "could be an influential one. It could be an interest that would allow the non-minority to protect his investment and provide guidance. It could be an interest which, in most other contexts, could be presumed to be potentially controlling, and in the context of a minority controlled entity, so influential as to warrant inclusion in a determination of the total number of cognizable interests held by such a person." MMB Opp. at 17-18, ¶ 28.

reasonable attorney was entitled to draw the same conclusion with respect to the minority exception of § 73.3555(d).

8. Application forms and Commission staff contacts.

Based on the "existing legal regime" as described above (as well as in Trinity's Motion to Vacate at 30-40), a reasonable attorney would not "necessarily" have concluded that "de facto control" was a relevant consideration in determining whether a station was "minority-controlled" for purposes of § 73.3555(d). Nor did any of the questions in the application forms submitted by Mr. May's client to the Mass Media Bureau indicate that anything more than minority ownership was required. Although the station applications contained a number of questions designed to elicit who owned NMTV, the applications contained no questions designed to elicit whether those owners would exercise actual working control over the stations sought to be acquired. Moreover, once Mr. May filed the applications on NMTV's behalf, the Mass Media Bureau had notice of why, in Mr. May's view, the minority exception applied: Mr. May specifically stated that "a majority of its directors are minorities, and [NMTV] is therefore minority controlled and in compliance with rule 73.3555(d)(1)."

Nothing in the Bureau's action granting the application suggested that "de facto control" was essential to qualify for the minority exception. As indicated by the undisputed affidavit of Alan Glasser, a former member of the Mass Media Bureau staff, Mr. Glasser had been "very concerned about the relationships" between the principals of Trinity and of NMTV. Declaration of Alan E. Glasser ¶ 4, *in* Trinity Motion to Vacate, Tab 1. In light of this concern, Mr. Glasser had gone to the Chief of the Bureau's Video Services Division "to ask if further information was necessary to show compliance with the Commission's minority ownership policy." *Id.* He was then "told to obtain NMTV's By Laws and if they

were in compliance with the state where executed *that would be sufficient*." *Id.* (emphasis added).[18] After receiving these bylaws, the Bureau granted the application. Thus, neither the application form itself nor the Bureau's action granting the application gave any indication that minority ownership alone was insufficient for a station to qualify as "minority-controlled" for purposes of the national multiple ownership rule.

* * * * *

For all these reasons, "the existing legal regime on which [Colby May] was entitled to rely," *FTS I*, 10 FCC Rcd at 8489, "would not necessarily have led a reasonable [attorney] to [the] conclusion" that something more than minority ownership was required for a station to qualify under the minority exception to the multiple ownership rule, *id.* at 8486. To the contrary, that legal regime would have led a reasonable attorney to conclude exactly the opposite, just as Mr. May did. Accordingly, Mr. May's advice—that NMTV's stations would be "minority-controlled" based solely on NMTV's status as a non-stock corporation having a majority of directors belonging to minority groups—was, at the very least, reasonable.

[18] The bylaws that Mr. May submitted to the Commission made clear that the day-to-day management of NMTV could rest with its president, Dr. Crouch. The bylaws provide: "the president shall, subject to the control of the Board of Directors, generally supervise, direct, and control the business and the officers of the corporation," including "the power to select and remove all agents and employees of the corporation." Bylaws of [NMTV] at 10, *in* TBF Ex. 101, Tab D. These bylaws were submitted to the Commission by Mr. May. *See* Declaration of Alan E. Glasser ¶ 4, *in* Trinity Motion to Vacate, Tab 1.

B. Nothing In The Mass Media Bureau's Most Recent Filing Casts Any Doubt On The Reasonableness of Colby May's Advice.

In its opposition to Trinity's motion to vacate, the Mass Media Bureau's comments are largely devoted to an unsuccessful effort to distinguish the authorities supporting Trinity's position. That pleading barely addresses the plain language of the rule and offers few arguments or authorities to support the position that the Commission adopted in 1993: that "the minority exception to the multiple ownership rules required that minorities have *de facto* control as well as the requisite ownership interests." MMB Opp. at 12, ¶ 20. The proper standard to be applied in evaluating these authorities is set forth in *FTS III*, where the Commission reaffirmed the "distinction between 'the actual state of the law' and 'what a reasonable applicant could be expected to know about the law.'" 11 FCC Rcd at 7782 (quoting *FTS I*, 10 FCC Rcd at 8486). So long as authorities available to Mr. May in 1986-87 did not "compel" the conclusion that minority ownership was insufficient to satisfy the minority exception of § 73.3555(d), then Mr. May's advice was reasonable, even if those authorities offer some support for the conclusion that the Commission ultimately reached. *Id.* As we have shown above, the Bureau's reliance on Note 1 to the multiple ownership rules is misplaced. *See* section A.2, *supra*. Nor do the other authorities cited by the Bureau compel, or even support, the conclusion reached by the Commission in 1993.

1. The cases cited in the Hearing Designation Order.

Although the Bureau concedes that the cases cited in the Hearing Designation Order, *see* HDO ¶ 13, 8 FCC Rcd at 2477, "do not involve the minority controlled exception to the multiple ownership rules," it asserts that those cases nonetheless "support the proposition that a substantial and material question exists when a licensee is under the actual control of another entity." MMB Opp. at 18-19, ¶ 30. The Bureau offers no support for the

assertion that these cases are relevant here. Indeed, those cases do not support the Bureau's position.

In "reject[ing] the contention that the minority-control portion of our multiple ownership rules precludes us from looking beyond mere legal ownership of a licensee," HDO ¶ 13, 8 FCC Rcd at 2477, the Commission cited four of its precedents. Two of these postdated Mr. May's 1986-87 advice and obviously could not have guided his conclusions.[19] As for the remaining two precedents, each gave the essentially same definition of "de facto control," a definition formulated to determine whether there has been an unauthorized "transfer of control" such as is proscribed by § 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d).[20] Because this authority does nothing more than define the term "control," it gives no guidance as to when "control" is a relevant consideration. It surely

---

[19] In any event, both precedents are distinguishable: neither considered the term "minority-controlled." Each merely determined what constituted "de facto" control in the particular circumstances of the case. One involved a "transfer of control" issue under § 310(d), *see Arnold L. Chase*, 5 FCC Rcd 1642, 1643-44 (1990), the other an alien ownership/control issue under § 310(b), *see Pan Pacific Television*, 3 FCC Rcd 6629, 6636 (1988).

[20] *See Southwest Tex. Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981) ("Traditionally, we have looked beyond legal title in determining whether a transfer of control has occurred; instead, we have defined control as embracing any act vesting in a new entity or individual the right to determine the basic policies concerning the operation of the station. . . . The Commission has recognized many times that there is no exact formula by which 'control' can be determined."); *Trustees of Univ. of Pa. Radio Station WXPN(FM)*, 69 FCC 2d 1394, 1396 (1978) ("[A] realistic definition of the term 'control' includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the license will pursue."). Both cases cited the exact same passage from *WHDH, Inc.*, 17 FCC 2d 856, 862-63 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Later in the HDO, the Commission rejected "the thesis that 'ownership' and not 'control' is the only benchmark the Commission may use in determining compliance with the Commission's multiple ownership rules relating to minority-controlled entities." HDO ¶ 37, 8 FCC Rcd at 2480. At this point, the Commission cited only *WHDH, Inc.* and its "realistic definition" of the word "control" for purposes of § 310(d).

does not "compel the conclusion" (*FTS III*, 11 FCC Rcd at 7782) that "de facto control" by minorities is a relevant consideration under the "minority-controlled" station exception.

In addition, there was no reason to believe that principles developed for interpreting the term "control" for purposes of § 310(d) apply ipso facto in interpreting the different term "minority-controlled" specially adopted for purposes of § 73.3555(d). In any event, *Southwest Texas* conceded that there is no "exact formula" for determining control, even as *Pennsylvania Trustees* purported to provide a "realistic definition" of the term. By contrast, in determining the meaning of "minority-controlled" for purposes of the national multiple ownership rule, Mr. May *did* have an "exact formula," and so he had no need to rely on a generalized "realistic" definition of a different term. In § 73.3555(d)(3)(C), Mr. May had before him a precise definition of "minority-controlled," a definition that made ownership alone dispositive. Finally, even if the definition of "controlled" in § 73.3555(d) were extended to *include* "de facto" control, this would (as discussed in section A.2 above) expand the exception, not contract it.

2. *Metro Broadcasting.*

The Bureau also relies on *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), together with the Commission's brief in that case, to argue that "ownership without control" would not advance the Commission's policies. MMB Opp. at 19, ¶ 31. Likewise, the HDO cited *Metro Broadcasting* in rejecting the notion that "minority ownership is seen as an end in itself." HDO ¶ 14, 8 FCC Rcd at 2477. Even if a legal brief and judicial decision from 1990 could properly be used to determine the reasonableness of advice rendered in 1986-87 —which they plainly cannot under *FTS I*—those authorities would not have "compelled a conclusion" different from Mr. May's. As demonstrated in the discussion of *Metro Broadcasting* above, *see* section A.4, *supra*, the interests that the Supreme Court found to

have motivated Congress and the Commission in adopting the minority preferences—*e.g.*, program diversity and minority entry into the industry—are advanced by minority ownership of broadcast stations whether or not such ownership is coupled with actual working control. There is nothing in the Commission's brief or in the Court's opinion to the contrary.

As the Mass Media Bureau notes, the Commission "anticipated that a grant to an applicant under the *de jure* control of minorities would, sooner or later, result in operations that reflected the views of the minorities who owned the stations." MMB Opp. at 15, ¶ 24 (citing *Minority Ownership in Broadcasting*, 92 FCC 2d at 850, 853, and *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d at 980-81); *accord Metro Broadcasting*, 497 U.S. at 570-71 ("[I]t is upon *ownership* that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the preservation of news." (emphasis in original)). Given this reasonable anticipation, the Commission had no need to mandate a de facto control requirement in the text of the national multiple ownership rule, and in fact did *not* mandate such a requirement.

3. The supposed distinction between the application requirements and the "real" requirements.

The Bureau attempts to explain away the clear ownership-only definition of "minority-controlled" in § 73.3555(d)(3)(C) by arguing that such definition merely stated what was required "*in the application* to acquire a minority controlled station." MMB Opp. at 15, ¶ 24; *see also id.* at 20, ¶ 32 ("[T]he exception's definition of minority controlled was intended to inform an applicant what showing it needed to make *in its application* in order for a non-minority to acquire an interest in a 13th or 14th television station." (emphasis added)). This argument is difficult to understand and impossible to credit. There is

absolutely nothing in the 1985 reconsideration order or in the text of the rule to suggest that the Commission's definition of "minority-controlled" should be taken merely as an application instruction rather than as the operative standard for regulatory compliance.

4. Commissioner Patrick's statement.

The Mass Media Bureau also tries to discount the import of Commissioner Patrick's statement, which is discussed in section A.5 above. This attempt is unavailing, however. The Bureau states: "Commissioner Patrick criticized the new rules because an applicant only had to demonstrate *de jure* control by minorities at the time the grant of the application was sought." MMB Opp. at 16, ¶ 25. Apart from the Bureau's specious implication of a distinction between application requirements and some additional, unstated requirement, we agree: Commissioner Patrick opposed the new minority exception because it required nothing more than "de jure control" (*i.e.*, ownership) by minorities. But that is precisely the rule adopted by the Commission over Commissioner Patrick's dissent—and without any disagreement from the other Commissioners that he had accurately characterized the rule. We also agree with the Bureau that "Commissioner Patrick never state[d] that an applicant that is not in fact minority controlled should be able to acquire a 13th or 14th television station." *Id.* Indeed, he thought that a station over which minorities did not exercise "de facto control" *should not* qualify as a "minority-controlled" station. Again, however, this was a dissenting view growing out of his unchallenged opinion that such a station would, in fact, qualify as "minority-controlled" under the Commission's rule.

5. The Commission's statements in *Reexamination of Section 73.3555.*

The Bureau, ignoring the language of the rule, argues that "the Commission [in the reexamination order] clearly expressed its belief that minorities were to control the extra stations. Specifically, the Commission stated its 'intention, of course, in permitting increased

levels of multiple ownership only where minority-controlled stations are involved is to encourage investment in and support for these stations.'" MMB Opp. at 17, ¶ 27 (quoting *Reexamination of Section 73.3555*, 50 Fed. Reg. at 27630). The quoted passage does not "clearly express[]" a belief that minorities were to "control" the extra stations. Rather, it states that the stations were to be "minority-controlled." In the sentence immediately prior to the sentence quoted by the Bureau, the Commission explained exactly what it meant by that term: "For purposes of [the exception], 'minority-controlled' broadcast stations are defined as those in which more than 50 percent of the equity interest is *owned* in the aggregate by persons who are members of a minority group." *Reexamination of Section 73.3555*, 50 Fed. Reg. at 27630 (emphasis added). When viewed as a whole, therefore, the Commission's statements in *Reexamination of Section 73.3555* surely do not "compel the conclusion" that the Commission was concerned to promote something other than minority *ownership* per se.

6. The LPTV minority preference.

The Bureau's remaining arguments constitute an effort to distinguish certain authority supporting Mr. May's interpretation. The Bureau concedes that "one could have concluded that for a low power television [LPTV] preference, the Commission was concerned only about ownership interests and not control." MMB Opp. at 13, ¶ 21. The Bureau argues, however, that one could not have carried this conclusion over to the multiple ownership rule because of essential differences between the two preference schemes. The Bureau's attempts to distinguish between the two preferences are unavailing, and even if the LPTV preference could be distinguished from the minority exception to the multiple ownership rules, this hardly proves that Mr. May's advice was unreasonable.

First, the Bureau makes the demonstrably erroneous assertion that "the word 'control'

does not appear in the discussion or rules for the awarding of [LPTV] preferences." *Id.* In the LPTV report and order, the Commission explicitly stated that "[p]references will be available for . . . applicants more than 50% *controlled* by minorities." *Random Selection Lotteries*, 93 FCC 2d at 953 (emphasis added).[21] More importantly, the text of the two relevant *rules* was identical in all essential respects. As explained in section A.6 above, the Bureau's concession that ownership was dispositive for purposes of the LPTV preference is necessarily based on the plain text of the LPTV rule, which grants preferences to applicants "more than 50% of whose ownership interests are held by members of minority groups." *Id.* at 1007. This language is essentially identical to the relevant language in the multiple ownership rule, § 73.3555(d)(3)(C): "more than 50 percent owned by one or more members of a minority group." A side-by-side comparison of the terminology used in the respective orders and rules is instructive:

	LPTV LOTTERIES	NATIONAL MULTIPLE OWNERSHIP RULE
Shorthand Reference	"more than 50% controlled by minorities," 93 FCC 2d at 953	"minority-controlled," 100 FCC 2d at 94
Regulatory Definition	"more than 50% of whose ownership interests are held by members of minority groups," 93 FCC 2d at 1007 (§ 1.1622(b)(1))	"more than 50 percent owned by one or more members of a minority group," 100 FCC 2d at 100 (§ 73.3555(d)(3)(C))

Second, the Bureau argues that consideration of minority ownership without regard to control was appropriate in the LPTV context but not in the multiple ownership context because LPTV service is "secondary" and "basically unregulated," MMB Opp. at 13, ¶ 21,

[21] The Bureau's assertion also ignores the statutory basis for the LPTV preference. In amending 47 U.S.C. § 309(i)(3)(A) in 1982, Congress ordered the Commission to grant a significant preference to any applicant "*controlled* by a member or members of a minority group." 96 Stat. at 1094 (emphasis added). Thus, the Commission's concern about ownership interests was necessarily a concern about the meaning of the phrase "controlled by a member or members of a minority group," which is the equivalent of "minority-controlled."

while "the Commission has traditionally imposed numerical limits on the number of stations that any one entity or person may own and control in the full power commercial television service," *id.* at 14, ¶ 22. No doubt low-power and full-power television differ in important respects, but the similarities in the respective regulatory regimes demonstrate the absence of any reason for assuming different criteria for minority preferences. The Commission's authority to award broadcast licenses by lotteries, though exercised only as to LPTV, also extended to full-power television. *See* 96 Stat. at 1094 (amending § 309(i)(3)(A) to authorize use of lotteries to grant licenses for "any media of mass communications"). Moreover, Section 310 of the Communications Act applies to LPTV just the same as it applies to full-power television. Finally, like licensees of full-power stations, LPTV licensees exercise editorial control over programming.

Third, the Bureau argues that

> unlike the Commission's clear expression of intent in *Lotteries*, 93 FCC 2d at 976-77, that minority ownership warranting a preference did not have to give minorities *de jure*, much less *de facto*, control, the Commission did *not* state or suggest that minority ownership of limited partnership interests or beneficial interests in a trust would be relevant in determining whether an applicant was minority controlled for purposes of the multiple ownership rules. Rather, the Commission stated that the additional stations in which group owners could hold interests in excess of the normal ceiling were to be "minority controlled." *Amendment of Section 73.3555*, 100 FCC 2d at 94.

MMB Opp. at 16, ¶ 26.

This argument is mistaken. The cited passage from *Random Selection Lotteries* does not provide anything like a "clear expression of intent" regarding "de facto" and "de jure" control; indeed, those terms do not appear *anywhere* in that document. The Bureau appears to argue that Mr. May should have concluded that (1) passive ownership interests did not qualify under the multiple ownership rule exception and that (2) since they did not, the

Commission intended to require *de facto* control. The first argument is unproven.[22] The second is a non-sequitur. The Commission could reasonably have decided not to include limited partnership and trust interests in the minority exception to the multiple ownership rule because they were not the kinds of ownership interests that could affect programming, as the owners had no right of control. This hardly suggests, however, that minority interests, such as those involved here, would have no impact. As the Bureau has conceded, the Commission "anticipated that a grant to an applicant under the *de jure* control of minorities would, sooner or later, result in operations that reflected the views of the minorities who owned the stations." MMB Opp. at 15, ¶ 24.

* * * * *

The character of the Bureau's position in this case is exemplified by a statement in the final substantive paragraph of its most recent filing: "nothing in any Commission pronouncement limited minority control of full power commercial broadcast stations to mere ownership." MMB Opp. at 20, ¶ 33. "Nothing," that is, except the text of the rule under consideration and supporting authorities. The rule's own definition stated that "'minority-controlled' means more than 50 percent owned by one or more members of a minority group." In the face of this oft-quoted definition, whose plain meaning is supported by numerous contemporaneous authorities, none of the authorities cited by either the Bureau in its opposition to Trinity's motion to vacate or the Commission in its HDO "compel the conclusion" that Mr. May's advice was unreasonable when rendered. *FTS III*, 11 FCC Rcd

[22] Mr. May's 1986-87 advice did not touch on the question whether passive ownership interests may be considered in determining whether a station is "more than 50 percent owned by one or more members of a minority group" within the meaning of § 73.3555(d)(3)(C). Thus, the Commission need not decide whether such passive interests qualify as "ownership" under the minority exception to the multiple ownership rules.

at 7782. As in *FTS I*, the "existing legal regime" in 1986-87 would not "necessarily" have led a "reasonable" attorney to the interpretation of the "minority-controlled" station exception later adopted by the Commission in its 1993 HDO. 10 FCC Rcd at 8486, 8489. To the contrary, that legal regime strongly confirmed the correctness of Mr. May's interpretation of the exception.

CONCLUSION

For the foregoing reasons, the Commission should conclude that Mr. May's advice to his clients was reasonable, and that the Mass Media Bureau's allegations that Mr. May lacked candor with the Commission are without merit. To hold otherwise would be to set a standard that is unfair to attorneys and to clients who justifiably rely on their advice.

Respectfully submitted,

Timothy B. Dyk
Barbara McDowell
Eric Grant
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Intervenor Colby May

November 15, 1996

CERTIFICATE OF SERVICE

I, Timothy B. Dyk of the law firm of Jones, Day, Reavis & Pogue, hereby certify that on this 15th day of November, 1996, copies of the foregoing Comments of Intervenor Colby May in Response to Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues were hand delivered or sent by first-class mail, postage prepaid, to the following:

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W. — Room 614
Washington, D.C. 20554

Daniel M. Armstrong, Esq.
Association General Counsel-Litigation
Federal Communications Commission
1919 M Street, N.W. — Room 602
Washington, D.C. 20554

John I. Riffer, Esq.
Assistant General Counsel-Administrative Law
Federal Communications Commission
1919 M Street, N.W. — Room 610
Washington, D.C. 20554

Joseph A. Marino, Esq.
Special Counsel-Administrative Law
Federal Communications Commission
1919 M Street, N.W. — Room 610
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W. — Room 314
Washington, D.C. 20554

Robert H. Ratcliff, Esq.
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W. — Room 314
Washington, D.C. 20554

Norman Goldstein, Esq.
Chief, Complaints/Political Programming Branch
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W. — Room 8210
Washington, D.C. 20554

James Shook, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W. — Room 7212
Washington, D.C. 20554

Nathaniel F. Emmons, Esq.
Howard A. Topel, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, N.W. — Suite 300
Washington, D.C. 20036

Gene A. Bechtel, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W. — Suite 250
Washington, D.C. 20036

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W. — Suite 400
Washington, D.C. 20006-1851

David E. Honig, Esq.
3636 16th Street, N.W., #B-366
Washington, D.C. 20010

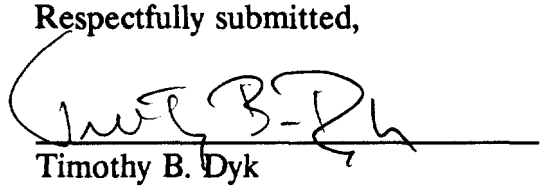
Timothy B. Dyk

at 7782. As in *FTS I*, the "existing legal regime" in 1986-87 would not "necessarily" have led a "reasonable" attorney to the interpretation of the "minority-controlled" station exception later adopted by the Commission in its 1993 HDO. 10 FCC Rcd at 8486, 8489. To the contrary, that legal regime strongly confirmed the correctness of Mr. May's interpretation of the exception.

CONCLUSION

For the foregoing reasons, the Commission should conclude that Mr. May's advice to his clients was reasonable, and that the Mass Media Bureau's allegations that Mr. May lacked candor with the Commission are without merit. To hold otherwise would be to set a standard that is unfair to attorneys and to clients who justifiably rely on their advice.

Respectfully submitted,



Timothy B. Dyk
Barbara McDowell
Eric Grant
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Intervenor Colby May

November 15, 1996

CERTIFICATE OF SERVICE

I, Timothy B. Dyk of the law firm of Jones, Day, Reavis & Pogue, hereby certify that on this 15th day of November, 1996, copies of the foregoing Comments of Intervenor Colby May in Response to Mass Media Bureau's Opposition to Motion to Vacate the Record on Improvidently Designated Issues were hand delivered or sent by first-class mail, postage prepaid, to the following:

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W. — Room 614
Washington, D.C. 20554

Daniel M. Armstrong, Esq.
Association General Counsel-Litigation
Federal Communications Commission
1919 M Street, N.W. — Room 602
Washington, D.C. 20554

John I. Riffer, Esq.
Assistant General Counsel-Administrative Law
Federal Communications Commission
1919 M Street, N.W. — Room 610
Washington, D.C. 20554

Joseph A. Marino, Esq.
Special Counsel-Administrative Law
Federal Communications Commission
1919 M Street, N.W. — Room 610
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W. — Room 314
Washington, D.C. 20554

Robert H. Ratcliff, Esq.
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W. — Room 314
Washington, D.C. 20554

Norman Goldstein, Esq.
Chief, Complaints/Political Programming Branch
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W. — Room 8210
Washington, D.C. 20554

James Shook, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W. — Room 7212
Washington, D.C. 20554

Nathaniel F. Emmons, Esq.
Howard A. Topel, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, N.W. — Suite 300
Washington, D.C. 20036

Gene A. Bechtel, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W. — Suite 250
Washington, D.C. 20036

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W. — Suite 400
Washington, D.C. 20006-1851

David E. Honig, Esq.
3636 16th Street, N.W., #B-366
Washington, D.C. 20010

Timothy B. Dyk